Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Review of the Section 251 Unbundling Obligations of Local Exchange Carriers	)	CC Docket No. 01-339
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

To: The Commission

PETITION

The Promoting Active Competition Everywhere ("PACE") Coalition, [1] by its attorneys, hereby petitions the Commission to adopt procedures as part of its unbundled network element ("UNE") triennial review proceeding[2] that provide state public utility commissions ("State Commissions") with a meaningful opportunity to apply their more proximate perspective on competitive conditions within their jurisdictions. The PACE Coalition maintains that proper application of the statutory standard compels retention of all existing UNEs. However, to the

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1 The PACE Coalition, a group of competitive local exchange carriers ("CLECs"), advocates policies that encourage broad-based competition for the telecommunications needs of residential and small business consumers through the use of the Unbundled Network Element Platform ("UNE-P" or the "Platform").

2 *In the Matter of Review of Section 251 Unbundling Obligations of Local Exchange Carriers*, CC Docket No. 01-339, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, and *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Notice of Proposed Rulemaking*, (released December 20, 2001) ("*Triennial Review NPRM*" or "*UNE Triennial Review*").

extent the Commission adopts reduced national minimum unbundling requirements at the conclusion of its *UNE Triennial Review*, State Commissions should retain the ability to decide whether those minimum requirements should take effect in their state. Such a procedure would ensure that federal and state regulators work together to achieve Congress' intent that local markets be opened to competition. The Coalition respectfully requests that the Commission expeditiously issue a Public Notice specifically requesting that interested parties address this proposal in the initial comments they file in response to the *Triennial Review NPRM*.[3]

I. INTRODUCTION

In the early 1990s, a number of states embarked on the bold experiment of local competition. Illinois, New York, Texas, Georgia and other state Commissions each built upon the other's innovations and added important contributions of their own to a growing understanding of the actions that would be needed to bring competition to this critical marketplace. Reflecting in large part what these states had learned by the mid 1990s, Congress enacted the Telecommunications Act of 1996[4] which (among other things) established local competition as a national goal, overrode inconsistent state laws that acted as barriers to entry, and empowered this Commission with the authority to adopt minimum requirements for competitive local opportunity.

There is no indication, however, that Congress intended the 1996 Act to disenfranchise states from continuing to refine the local experiment, taking the actions they find necessary to encourage competition in their respective states. While the Act recognized the need for federal

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[3] There is no question that interested parties will have sufficient time to review this proposal and incorporate their thoughts into their initial written comments, since initial comments are not due to be filed until March 18, 2002.

[4] Telecommunications Act of 1996, Pub. L. No. 104—104, 110 Stat. 56, codified at 47 U.S.C. §§ 251 *et seq* (*"1996 Act"*).

minimums that would provide a uniform foundation, states retained the authority to adopt additional policies and requirements to promote competition in their states. Section 251(d)(3) of the Act provides state regulators with the authority to establish additional unbundling obligations, so long as those obligations are consistent with the Act.[5]

The Commission acknowledged the significant role played by the states prior to enactment of the 1996 Act and the continuing role to be played by the states in implementing local competition in its August 1996 *Local Competition Order*:

> Virtually every decision in this Report and Order borrows from decisions reached at the state level, and we expect this close association with and reliance on the states to continue in the future. We therefore encourage states to continue to pursue their own pro-competitive policies. Indeed, we hope and expect that this Report and Order will foster an interactive process by which a number of policies consistent with the 1996 Act are generated by the states.[6]

Significantly, the national experiment with local competition is still under way, with the states continuing to supply the differentiation and inventiveness needed for the evolution of competition to continue.[7] The Commission must assure that its *UNE Triennial Review*

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5 47 U.S.C. § 251(d)(3).

6 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, para. 53 (1996) (*"Local Competition Order"*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3rd 1068 (8th Cir. 1997) and *Iowa Utilities Board v. FCC*, 120 F.3rd 753 (8th Cir. 1997), *aff'd in part and remanded, AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999), *on remand, Iowa Utilities Board v. FCC*, 219 F.3rd 744 (8th Cir. 2000), *petitions for writ of certiorari granted, Verizon Communications, Inc. v. FCC*, 121 S. Ct. 877 (2001); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 (1997), further reconsideration pending.

7 It is clear that local competition is proceeding at remarkably different rates in different states. An important role for the Commission's *UNE Triennial Review* should be to determine *why* competition is proceeding more rapidly in some jurisdictions and develop national minimum requirements to promote similar results elsewhere.

proceeding not disrupt this process. While national minimum standards provide a useful floor to the competitive experiment, that floor is no substitute for considered state actions promoting competition.

There should be no question that the states are in the best position to judge the competitive needs of their markets (above the national minimums). State regulators (a) have access to the detailed real-world information that is essential to reasoned decision-making on this issue, (b) employ procedures (such as discovery and cross examination) that are most compatible with fact-finding and verification, and (c) are in the best position to balance competitive policies with the regulatory/deregulatory framework that governs the incumbent local exchange carrier ("ILEC") in their state. Moreover, in many states, ILECs have gained regulatory flexibility through state statutes that contemplate more robust competition than would result through application of national minimum standards.[8] As explained below, the states should determine whether any reduction in federal minimums should be implemented in their jurisdiction, because only the states are able to comprehensively consider the effect of any potential reduction in ILEC unbundling obligations on the consumers and small businesses within their borders.[9]

II. DISCUSSION

A. The Commission's UNE Triennial Review Will Be Very Fact-Specific

In its conduct of the *UNE Triennial Review*, the Commission intends to consider, on a UNE-by-UNE basis, whether carriers would be 'impaired' in their ability to offer the

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8 For instance, the Illinois Public Utility Act recently classified certain of Ameritech Illinois' small business services as competitive through a comprehensive amendment that also ensured that the full menu of network elements would be available to competitors to serve small businesses. Illinois Public Utility Act Section 13-502.5.

9 As indicated above, the Coalition believes that each of the current UNEs meet the statutory impair standard and should be retained.

telecommunications services they seek to provide without continued access to that UNE.[10] In the *UNE Remand Proceeding* the Commission found that impairment exists if the lack of access to a UNE "materially diminishes" a carrier's ability to provide the services it seeks to offer[11] and it identified several factors to be considered in deciding whether the materially diminished standard is met.[12] The Commission intends to use the standards developed in that proceeding as the "building blocks" of the *UNE Triennial Review*, while incorporating "the technological advances and marketplace changes that have taken place during the interim."[13]

The factors previously identified by the Commission as essential to an impairment analysis are highly fact-specific and may vary from geographic region to geographic region. The Commission proposes in the *UNE Triennial Review* to conduct an even more refined and fact-specific analysis. The Commission seeks comment on applying the unbundling analysis to (1) specific services; (2) specific geographic locations; (3) differing facilities; (4) specific customer types; and (5) requesting carrier type.[14] In particular, the Commission seeks comment on whether and how to take geography into account in the unbundling analysis, asking specifically whether political boundaries, metropolitan statistical areas ("MSAs"), density zones, or other

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10 *Triennial Review NPRM*, para. 7, citing *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking ("*UNE Remand Order*"), 15 FCC Rcd 3696.

11 *UNE Remand Order*, 15 FCC Rcd at 3725.

12 Those factors were (1) the costs incurred using alternatives to the incumbent's network; (2) delays caused by the use of alternative facilities; (3) material degradation in service quality; (4) the ability of a requesting carrier to serve customers ubiquitously using its own facilities or those acquired by third-party suppliers; and (5) the impact that self-provisioning a network element or obtaining it from a third-party supplier may have on network operations.

13 *Triennial Review NPRM*, para. 15.

14 *Id.* at para 35. In seeking comment on applying the unbundling analysis to specific services, the Commission solicits input on how to factor in the level of competition for a particular service. *Id.* at para. 38.

delineations are the proper geographic delineations for determining impairment.[15] More generally, it strongly encourages parties to submit evidence of actual marketplace conditions, indicating that evidence of that type "will be considered more probative than other kinds of evidence."[16]

B. The States are Best Positioned to Conduct the Fact-Specific Inquiry Contemplated by the FCC

While the PACE Coalition sees potential merit with the concept of a more sophisticated and 'granular' analysis of the ILECs' unbundling requirements, the Coalition questions whether the Commission is in the best position to adduce these facts, particularly when they may vary considerably from location to location. The nature of a 'notice and comment' rulemaking proceeding does not naturally lend itself to the development of the empirical record contemplated here. Notice and comment proceedings, which are typically conducted exclusively through the submission of written documents (initial and reply comments, and ex parte filings) do not include the discovery, witness testimony, and cross examination on the record that are the basic vehicles used by state regulators to test veracity and resolve complex factual issues. The Coalition questions whether the confines of a rulemaking docket provide the Commission with the tools needed to fully develop the facts.

It is also important to keep in mind that the Commission is a national body charged with establishing requirements that are uniform throughout the nation. It is by definition and design removed from the local conditions that the Commission itself agrees should inform any decisions reached regarding future UNE availability. Furthermore, a single 'one size fits all' rule governing access to UNEs may not be the most appropriate outcome to the UNE review process.

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15 *Id.* at para. 39.

16 *Id.* at para. 17.

The Commission acknowledges this by specifically seeking comment on whether or not to adopt different rules based upon a variety of criteria, including physical location, customer type, and/or type of carrier providing service. However, the more granular the inquiry, the more dependent that inquiry is on the detailed factual data that is difficult to develop and impossible to verify in a 'notice and comment' proceeding. Indeed, in the *Triennial Review NPRM*, the Commission itself "recognize[s] that state commissions may be more familiar than the Commission with the characteristics of markets and incumbent carriers within their jurisdictions, and that entry strategies may be more sophisticated in recognizing regional differences."[17]

The PACE Coalition believes that the best course of action is one where this Commission and state regulators each focus their efforts on what they do best. For the FCC, this means utilizing the *UNE Triennial Review* to adopt a national list of UNEs that represents the minimum unbundling requirements necessary to give effect to the congressional policy embodied in the 1996 Act. For the states, this means assuming the responsibility to apply local conditions to determine whether the minimum federal requirements should be permitted to take effect in their state, including determining whether any reduced federal minimums achieve the pro-competitive goals of their own state statutes and the regulatory/deregulatory framework that applies to the ILECs in their state, or whether additional unbundling is warranted.

Stated directly, the Commission should adopt a baseline national list of UNEs in the *UNE Triennial Review* that define the ILECs' minimum obligations and it should leave to each state the decision as to whether those minimum requirements – to the extent they constitute lesser unbundling obligations than those that exist today – should be permitted to take effect in their

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17 *Id.* at para 75.

state. [18] Of course, states would remain free to require additional unbundling. The PACE Coalition respectfully requests that the Commission expeditiously issue a Public Notice specifically requesting that interested parties address this proposal in the initial comments they file in response to the *Triennial Review NPRM.* The process outlined in this petition is the best way to balance national minimum requirements developed by the Commission on the basis of generic information with more specific rules which reflect actual local marketplace conditions adopted by the states.

C. The States are in the Best Position to Assess Local Marketplace Conditions

The vast majority of exchange revenues are the responsibility of state regulators, not the FCC. Based on ARMIS data for 2000, 70% of the ILECs' regulated revenues are regulated by the states, with more than 90% of the ILECs' interstate revenues related to a single service, *i.e.* access. The uncontested conclusion is that the states have the *effective* responsibility for the local marketplace, even though federal minimum standards do apply.

An important consequence of these statistics is that there is a significant potential for harm if there is a disconnect between the degree of local competition in a state and the amount of retail price deregulation the ILEC enjoys in that state. Only the states are in the position to fully understand the interrelationship between retail price regulation and local competition and to guard against an outcome where consumers lose the protection of regulation without first enjoying its preferable alternative, *i.e.* competition.

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[18] A state would be free at any time to decide on its own motion to initiate a docket to review whether a UNE or UNEs should continue to be required. A docket could also be initiated upon petition by an interested party. If a docket is triggered by the filing of a petition by an entity requesting that a UNE or UNEs be restricted or eliminated, that party would have the burden of proof that carriers would not be impaired if access were restricted or eliminated.

Moreover, state commissions have the real-world expertise and experience with local competition that is essential to reasoned decision-making. The Commission should not risk squandering the unique talents and expertise of the individual states in favor of a 'one size fits all' federal system. The Commission asks in the *Triennial Review NPRM* whether the "states [are] better situated to tailor unbundling rules that more precisely fit their markets?"[19] That question should certainly be answered in the affirmative with respect to action beyond the federal minimum requirements, for both Congress and the Commission have recognized that the Act did not intend for federal action to supplant consistent state actions promoting local competition.

D. The States Have the Authority to Play the Role Outlined in this Petition

The role outlined for the states in this petition is consistent with the 1996 Act and the Commission's decisions interpreting the statute. As noted, Section 251(d)(3) of the Act provides state regulators with the authority to establish additional unbundling obligations, so long as those obligations comply with subsections 251(d)(3)(B) and (C).[20] Section 251(d)(3) states:

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a state commission that –
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> (A) establishes access and interconnection obligation of local exchange carriers;
> (B) is consistent with the requirements of this section; and
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

In the *UNE Remand Order*, the Commission held that section 251(d)(3) grants state regulators the authority to impose obligations upon ILECs beyond those imposed by the national UNE list

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19 *Id.* at para. 76.

20 In addition, many states have independent authority under their own governing statutes to order unbundling without reliance on the 1996 Act.

adopted by the Commission in that order, so long as the additional state-imposed obligations "meet the requirements of Section 251 and the national policy framework instituted in [that] Order."[21] Section 51.317 of the Commission's rules sets forth the standard state commissions must apply to impose additional unbundling requirements using authority derived from the 1996 Act. Specifically, a state must conclude (for non-proprietary network elements) that requesting carriers would be impaired without access to the network element in question.[22] A state-conducted proceeding which applies the 'impair' analysis to a UNE before its availability is restricted or eliminated in a state is entirely consistent with Section 251(d)(3) and Rule 51.317. While such proceedings may result in states reaching conclusions regarding impairment that are different that those reached by the Commission when it establishes national minimum unbundling requirements, such results would not be inconsistent with the Act or the Commission's rules.[23] Of course, a state may have independent authority under state law to require additional unbundling through application of the standard adopted by the state legislature.[24]

A decision by the Commission to adopt this decision-making process would be consistent with the roles already being played by several leading states. The Public Utility Commission of

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21 *UNE Remand Order*, 15 FCC Rcd at 3767, para. 154.

22 47 C.F.R. § 51.317.

23 Sections 261(b) and (c) reinforce the important role of the states. They provide:

> (b) EXISTING STATE REGULATIONS – Nothing in this part shall be construed to prohibit any state commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.
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> (c) ADDITIONAL STATE REQUIREMENTS – Nothing in this part precludes a state from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the state's requirements are not inconsistent with this part or the Commission's regulations to implement this part. 47 U.S.C. § 261 (b) and (c).

Texas ("Texas PUC") is conducting a proceeding in which it is considering whether carriers would be impaired under the 1996 Act without unrestricted access to unbundled local switching ("ULS") as a network element.[25] The Texas PUC is also considering whether impairment would exist without access to the Operator Services ("OS") and Directory Assistance ("DA") UNEs, given the nature of the customer routing offering proposed by SBC.[26] The Pennsylvania Public Utility Commission ("PA PUC") has determined that local switching (as well as the other elements that form the UNE Platform) should be available as unbundled network elements to serve small businesses until December 31, 2003.[27] Furthermore, the Illinois Commerce Commission ("ICC") is in the process of developing a new list of UNEs that must be made available to competitors in that state in order to implement the new Illinois Public Utility Act, which is intended to achieve a fully competitive market in Illinois.[28]

The state regulators' national association has already gone on record in favor of a highly substantive role for the states in the *UNE Triennial Review* proceeding. In a letter to each of the federal commissioners, the leaders of NARUC's Communications Committee said:

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24 *See e.g., Texas Public Utility Regulatory Act ("PURA")*, Chapter 60, Subchapter B.

25 *Petition of MCIMetro Access Transmission Services, LLC, Sage Telecom, Inc., Texas UNE Platform Coalition, McLeodUSA Telecommunications Services, Inc. and AT&T Communications of Texas, L.P. for Arbitration with Southwestern Bell Telephone Company Under the Telecommunications Act of 1996*, Docket No. 24542, Public Utility Commission of Texas.

26 In addition, the Texas PUC is considering if under state law there is competitive merit and it is in the public interest for ULS, OS and/or DA to be available as UNEs. *PURA* Section 60.022 gives the PUC authority to require additional unbundling (*i.e.*, beyond the federal minimums) of any network element that has "competitive merit" or is in the "public interest."

27 *Opinion and Order*, Docket Nos. P-00991648 and P-00991649, Pennsylvania Public Utility Commission, August 26, 1999, page 85. "Small business" is defined as any business with total billed revenues from local and intraLATA toll services at or below $80,000.00 annually.

28 Illinois Public Utility Act § 13-801.

> [G]iven the critical role played by state regulators in implementing the statutory UNE regime, as well as the intensive data- and state-specific nature of the three-year review, [ ] *at a minimum*, the Commission should establish a formal mechanism to secure the state participation necessary for an informed application of the statutory "impair" standard.[29]

The approach urged in this petition is also consistent with the suggestion made by the Competitive Telecommunications Association ("CompTel") that the Commission convene a Federal-State Joint Conference on UNEs to inform its implementation of the *UNE Triennial Review*.[30] CompTel cites the "data-intensive" and "state-specific nature of the issues that will be addressed" in the *UNE Triennial Review* as the reason state regulators' involvement in the process is so important.[31] The PACE Coalition echoes that belief and urges the Commission to cement that involvement -- and, equally importantly, to explicitly recognize the necessary interplay between a national minimum list of UNEs and the states' legitimate authority to require additional unbundling -- through adoption of the process suggested in this petition.

III. CONCLUSION

For all of the foregoing reasons, the PACE Coalition hereby requests that the Commission expeditiously issue a Public Notice requesting that interested parties respond to the proposal contained in this petition when filing initial comments in the *UNE Triennial Review* proceeding. The Coalition requests further that the Commission adopt a minimum national list of UNEs in the that docket and that it leave to each state the decision as to whether those

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29 Letter from Joan Smith, Chair, Thomas Dunleavy, Vice Chair, and Robert B. Nelson, Vice Chair, NARUC Communications Committee, to Michael Powell, Chairman, Federal Communications Commission, CC Docket No. 96-98 (December 5, 2001), page 2 (emphasis in original).

30 *Petition of the Competitive Telecommunications Association*, CC Docket No. 96-98 (filed November 26, 2001), page 6.

31 *Id.* at page 7.

minimum requirements – to the extent they constitute lesser unbundling obligations than those that exist today – should be permitted to take effect in their state.

Respectfully Submitted:

THE PACE COALITION

By: Genevieve Morelli

Genevieve Morelli
KELLEY DRYE & WARREN LLP
1200 19th St., N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600

Its Attorney

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